Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

_____ TERM, 19____

NO. 79-1914

ELIZABETH ANN HARBOUR,
Petitioner

v.

WILLIAM T. HARBOUR,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

CRAWFORD & GRISSOM, INC.
STANLEY W. CRAWFORD
705 Main Street, Suite 400
Houston, Texas 77002

Counsel for Petitioner

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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The Petitioner prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of Texas entered in the above case on February 27, 1980.

OPINION BELOW

The opinion of the Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas is reported at 590 S.W.2d 828. The Supreme Court of Texas denied Petitioner's Writ of Error citing no reversible error with no opinion.

JURISDICTION

The judgments of the Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas were made and entered on November 21, 1979 and a copy thereof, is appended to this petition in the Appendix at p. A-4. The order denying Petitioner's Application for Writ of Error was dated February 27, 1980 and is appended to this petition in the Appendix at p. A-7. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

In a discovery proceeding in aid of enforcement of a judgment brought pursuant to Rule 621(a) of the Texas Rules of Civil Procedure by the Petitioner against the Respondent, the Petitioner sought to enforce a judgment debt in the amount of $25,000.00 awarded in a decree of divorce dated March 15, 1972.

The Respondent interposed a general discharge in bankruptcy entered on July 12, 1972 by way of a Motion for Protection, Plea in Abatement and Request for Restraining Order in opposition to Petitioner's Bill of Discovery. After submission of briefs and oral arguments of counsel, the court denied the Petitioner's Bill of Discovery and determined that the judgment debt sought to be enforced was dischargeable, as a matter of law, within the meaning of the Bankruptcy Act, Section 17 et. seq. 11 U.S.C.A., § 35 et. seq. as amended effective October 19, 1979. The decision of the trial court was thereafter affirmed by the Court of Civil Appeals for the 14th Supreme Judicial District of Texas on the basis that there was no language contained in the Decree of Divorce indicating that

the unequal division of community assets in favor of your Petitioner was based upon the need for future support and maintenance of the wife; and further, that for such a judgment to be non-dischargeable in bankruptcy, the decree must clearly smack of alimony on its face. The Supreme Court of Texas denied Petitioner's Application for Writ of Error on February 27, 1980, citing no reversible error in the Court of Civil Appeals' opinion. The question presented is:

> "Whether the judgment rendered by the Court of Civil Appeals for the 14th Supreme Judicial District of Texas and affirmed by the Supreme Court of Texas denies the Petitioner and other spouses similarly situated in Texas equal protection under the 14th Amendment of the United States Constitution due to the conflict between Section 17(a)(7) of the the Bankruptcy Act and Texas Marital Property Law prohibiting an award of alimony.

STATE AND FEDERAL STATUTES INVOLVED

The pertinent portions of the Bankruptcy Act, Section 17 et. seq., 11 U.S.C.A., § 35 as amended effective October 19, 1970, and the Texas Family Code Ann. Section 3.63 (1970) are set forth in the Appendix.

STATEMENT

On March 17, 1972 a Decree of Divorce was entered in the 311th District Court for the State of Texas rendering judgment in the amount of $25,000.00, together with interest at the rate of six (6) percent per annum from January 1, 1972 in favor of your Petitioner. On May 11, 1972, the Respondent Dr. William T. Harbour, Sr., filed

a petition in bankruptcy scheduling the judgment debt awarded the Petitioner in the Decree of Divorce dividing the community estate of the parties. On June 12, 1972, your Petitioner filed a Proof of Claim and on May 4, 1975, an order for payment of dividend was entered ordering the trustee in bankruptcy to distribute a dividend in the amount of $894.31 on the debt.

No Application for Determination of Non-Dischargeability of the debt in question was filed in the bankruptcy proceedings on behalf of either Petitioner or Respondent. A general order of discharge was entered in the bankruptcy proceedings on July 12, 1972 discharging the bankrupt, Respondent herein, from all dischargeable debts with the exception of those excepted from discharge under Section 17(a)(7) of the Bankruptcy Act, the pertinent portion to the case at bar.

Elizabeth Ann Harbour, Petitioner herein, the ex-wife of William T. Harbour, Sr., Respondent herein, instituted discovery proceedings against William T. Harbour, Sr., Respondent, to enforce the judgment debt. The Respondent interposed that General Discharge in Bankruptcy entered on July 12, 1972, by way of a Motion for Protection, Plea in Abatement and Request for Restraining Order in Opposition to the Discovery Proceedings. On March 19, 1972, the Court ordered the submission of briefs on the question of law presented and on April 16, 1979, after submission of briefs and oral arguments of counsel, the Court denied the Petitioner's Bill of Discovery-After judgment and determined that the judgment debt sought to be enforced was dischargeable, as a matter of law, within the meaning of the Bankruptcy Act, Section 17 et seq., 11 U.S.C.A., § 35 et. seq.

as amended effective October 19, 1970. Subsequently, Petitioner perfected an appeal to the Court of Civil Appeals of the 14th Supreme Judicial District for the State of Texas. The Court of Civil Appeals affirmed and upon Writ of Error the Supreme Court of the State of Texas denied Petitioner's writ citing no reversible error.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it maintains the conflict between Federal Bankruptcy and Texas Marital Property Law. This case presents important and challenging questions in these two areas; specifically, the conflict which arises between the two due to the public policy of the State of Texas with regard to alimony.

The Petitioner urged throughout these proceedings that the case of *In Re Nunnally,* 506 F.2d 1024, (5th Cir. 1975) controls the issue in the case at bar. In determining whether or not a given debt incurred in a property settlement agreement or entered in a Decree of Divorce falls within the alimony exception to Section 17(a)(7) of the Bankruptcy Act, the Courts have consistently held that it is not what a debt is called but what the substance of it is that controls.

The *Nunnally* case found that debts created between divorced spouses by court ordered divisions of the community estate of the parties are non-dischargeable in bankruptcy based upon the Texas Public Policy against alimony and the factors which Texas courts are required to take into consideration in dividing the community estate of the parties to a divorce.

Due to the failure of the Supreme Court of Texas to accept the Petitioner's Application for Writ of Error,

and render a clarification in these areas, Texas citizens are left in a quandry. In light of the unique Texas Marital Property Law involving community property, the Petitioner and all Texas citizens are prohibited from equally and fairly proceeding under the Federal Bankruptcy Statute, which thereby offends equal protection.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for Writ of Certiorari should be granted.

CRAWFORD & GRISSOM, INC.

STANLEY W. CRAWFORD
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Stanley W. Crawford, the attorney for the Appellant, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ day of _____, 19____, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States to Robert C. Floyd, counsel for the Respondent.

STANLEY W. CRAWFORD
Counsel for Petitioner

APPENDIX A

State Statute Involved

Texas Family Code Ann. 3.63 (1970):

> In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

APPENDIX B

Federal Statute Involved

Bankruptcy Act 11 U.S.C. 35(a):

(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy: Provided, however, that a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankrupty in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this title: And provided further, That a discharge in bankruptcy shall not release or affect any tax lien; (2) are liabilities for

obtaining money or property by false pretenses or false representation, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; (5) are for wages and commissions to the extent they are entitled to priority under subdivision (a) of the section 104 of this title; (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment; (7) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female or for breach of promise of marriage accompanied by seduction, or for criminal conversation; or (8) are liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision.

APPENDIX C

Affirmed, and Opinion filed November 28, 1979.

NO. A2212

ELIZABETH ANN HARBOUR, Appellant

vs.

WILLIAM T. HARBOUR, SR., Appellee

Appeal from 311th District Court
of Harris County

This is an appeal from a final order of the trial court denying a post-judgment bill of discovery on the ground that the subject judgment had been discharged in bankruptcy and was therefore no longer enforceable. We affirm.

In the March 17, 1972, decree of divorce of appellant and appellee, appellant was awarded a $25,000.00 judgment as part of the court-ordered division of the community property of the parties. On May 11, of the same year appellee filed a petition in bankruptcy in which he listed as a debt of the estate the $25,000.00 judgment. His divorced wife appeared in bankruptcy court, filed a claim for the judgment, and received a liquidating dividend of $894.31 upon his discharge from bankruptcy on July 12, 1972.

On Febraury 23, 1979, six and one half years later, appellant filed a bill of discovery claiming that the judg-

ment was unpaid. On appellee's motion for protection, the court entered the order referred to above denying discovery and declaring the $25,000.00 judgment unenforceable.

Appellant, in her sole point of error, contends that under the rationale of *In re Nunnally,* 506 F.2d 1024 (5th Cir. 1975) the judgment debt was not a dischargeable debt within the meaning of Section 17 of the Bankruptcy Act of 1898. It is therein provided that among the debts which are not subject to discharge "are those for alimony due or to become due, or for maintenance or support of a wife. . . ." Bankruptcy Act § 17(a), 11 U.S.C. § 35(a) (1970).

Despite the Texas Supreme Court's holding in *United States v. Stelter,* 567 S.W.2d 797, 798 (Tex. Sup. 1978), that " '(a)limony' after divorce, as such, is not permitted in Texas," appellant urges that the *Nunnally* case controls the issue. There the court held that a property division may be a substitute for alimony and hence be non-dischargeable in bankruptcy. Stating that ". . . we should not be bound by the label which the state places on a decree; we must look to its substance", 506 F.2d 1024, 1027, the federal appellate court held that in that case the divorce award fell within the exception from discharge contained in Section 17.

It is interesting, if not decisive, to note that the *Nunnally* case originated as an appeal of the decision of the referee in bankruptcy, while in the case at hand the bankruptcy court's decree was unchallenged for over six years prior to the institution of the discovery proceedings.

It is generally recognized "that a property settlement agreement between spouses is dischargeable in bank-

ruptcy, at least where it is truly or substantially a property agreement, and not an agreement for alimony, support or maintenance." Annot. 74 A.L.R. 2d 758 (1960). Therefore, even under *Nunnally,* when a divorced spouse asserts that the claim has—or has not—been discharged in bankruptcy the order of the divorce court must be examined to determine whether the judgment comprises solely a property division or also includes an obligation to support. *In re Smith,* 436 F. Supp. 469 (N.D. Ga. 1977). Had appellant contested the dischargeability of the judgment in the bankruptcy court in 1972, she would have had the burden of proving that the $25,000.00 debt was an obligation in the nature of alimony, support or maintenance. Bankruptcy Rule 407. She should have no less burden in the district court when asserting the continued viability of a discharged judgment. She has not discharged this burden. There is nothing in the record other than the March 17, 1972, divorce decree that is evidentiary on the issue. This decree indicates clearly that the $25,000.00 judgment was an integral part of the division of the community estate of the parties. Nothing therein smacks of alimony. The trial court did not err in sustaining the motion for protection and in holding the $25,000.00 award was discharged in the bankruptcy proceedings.

Judgment of the trial court is affirmed.

/s/ George E. Miller
Associate Justice

Judgment rendered, and Opinion filed November 28, 1979.

Panel consists of Chief Justice Brown and Associate Justices Miller and Pressler.

APPENDIX D

IN THE
SUPREME COURT OF TEAS

February 27, 1980

No. B-9125

ELIZABETH ANN HARBOUR

vs.

WILLIAM T. HARBOUR, SR.

From Harris County,
Fourteenth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presented no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.